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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-17

THOMAS S. EISENSTADT, as he is Sheriff of Suffolk County, Massachusetts,

Appellant,

—v.—

WILLIAM R. BAIRD,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND CIVIL LIBERTIES UNION OF MASSACHUSETTS, AMICI CURIAE

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Interest of Amici*

The American Civil Liberties Union, and its affiliate, the Civil Liberties Union of Massachusetts, are organizations whose basic commitment is to the preservation of personal liberty in the face of governmental actions which threaten to infringe constitutional guarantees of such liberty.

* Letters of consent for the filing of a brief *Amici Curiae* have been obtained from counsel for the respective parties and filed with the Clerk of the Court.

For many years, this institutional commitment has encompassed the right of privacy generally, and has included a particular concern with restrictions on the dissemination of information concerning, and on the use and distribution of, contraceptive devices.

In *Poe* v. *Ullman*, 367 U.S. 497 (1961), the American Civil Liberties Union and the Connecticut Civil Liberties Union filed a brief as *Amici Curiae* which fully articulated a right to privacy basis for a decision on behalf of appellants. This approach was substantially reflected in the majority opinions in *Griswold v. Connecticut*, 381 U.S. 479 (1965). In the instant case, your *Amici* argue that similar grounds should underlie a decision for the appellee, William R. Baird.

Questions Presented

1. Whether the restrictions on the distribution of contraceptive devices in Massachusetts G.L. c. 272 §§21 & 21A unconstitutionally burden the right of privacy of married and unmarried individuals who wish to employ such devices.

2. Whether the appellee has standing to assert the claim embodied in issue 1.

The Opinions Below

The opinion of the Circuit Court of Appeals vacating the order of the District Court is reported at 429 F.2d 1398 (1st Cir. 1970). The opinion of the District Court is reported at 310 F. Supp. 951 (1970). The opinion of the Massachusetts Supreme Judicial Court is reported at 355 Mass. 746, 247 N.E.2d 574 (1969).

Statutes Involved

The Massachusetts statutes involved are Mass. G.L. c. 272 §21, as amended by Acts of 1966, c. 265, §3, which provides:

> "Except as provided in section twenty-one A, whoever sells, lends, gives away, exhibits, or offers to sell, lend or give away an instrument or other article intended to be used for self-abuse, or any drug, medicine, instrument or article whatever for the prevention of conception or for causing unlawful abortion, or advertises the same, or writes, prints, or causes to be written or printed a card, circular, book, pamphlet, advertisement or notice of any kind stating when, where, how, of whom or by what means such article can be purchased or obtained, or manufactures or makes any such article shall be punished by imprisonment in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years or by a fine of not less than one hundred nor more than one thousand dollars."

And Mass. G.L. c. 272, §21A, as inserted by Acts of 1966, c. 265, §1, which provides:

> "A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. A registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician.

"A public health agency, a registered nurse, or a maternity health clinic operated by or in an accredited hospital may furnish information to any married person as to where professional advice regarding such drugs or articles may be lawfully obtained.

"This section shall not be construed as affecting the provisions of section twenty-one relative to prohibition of advertising of drugs or articles intended for the prevention of pregnancy or conception; nor shall this section be construed so as to permit the sale or dispensing of such drugs or articles by means of any vending machine or similar device."

Statement of the Case

On April 6, 1970, Appellee addressed an audience of students and faculty at Boston University on the subject of birth control and over-population. His address was approximately one hour in length and consisted of a discussion of various contraceptive devices displayed by means of diagrams on two demonstration boards, as well as a display of contraceptive devices in their original packages. In addition, petitioner spoke of the respective merits of various contraceptive devices; over-population in the world, crises throughout the world due to over-population; the large number of abortions performed on unwed mothers; quack abortionists and the potential harm to women resulting from abortions performed by quack abortionists. Petitioner also encouraged members of the audience to petition the Massachusetts Legislature and to make known their feelings with regard to birth control laws in order to bring about a change in the laws. Petitioner further stated that he knew he was violating the

law and invited arrest. At the close of the address petitioner invited members of the audience to come to the stage and help themselves to the contraceptive articles. Petitioner personally handed a woman a package of Emko Vaginal Foam. He was then arrested and charged with exhibiting and delivering a contraceptive article, and subsequently convicted for violating Mass. G.L. c. 272, §§21, 21A. The Supreme Judicial Court of Massachusetts reversed the conviction for exhibiting on First Amendment grounds, but by a 4-3 vote upheld as constitutional the statute's prohibition on distribution. *Commonwealth* v. *Baird,* 355 Mass. 746. The United States Supreme Court denied a petition for writ of certiorari. *Baird* v. *Massachusetts,* 396 U.S. 1029 (1970). Thereafter, a petition for writ of habeas corpus in the United States District Court for the District of Massachusetts was dismissed. *Baird* v. *Eisenstadt,* 310 F. Supp. 951 (1970). On appeal, the United States Court of Appeals for the First Circuit vacated the order of the District Court and remanded the action with instruction to grant the writ of habeas corpus, discharging Mr. Baird, *Baird* v. *Eisenstadt,* 429 F.2d 1398.

ARGUMENT

I.

The Constitution protects the right of personal choice over those events which, by their character and consequences, bear in a fundamental manner on physical and sexual privacy; clearly included within this protection is the right of married and single individuals to employ contraceptive devices.

The right of free personal choice—of autonomy—over one's own body was recognized by this Court eighty years ago:

> No right is more sacred, [n]or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others unless by clear and unquestionable authority of law. As well said by Judge Cooley, the right to one's person may be said to be a right of complete immunity: "to be let alone." *Union Pac. Ry.* v. *Botsford,* 191 U.S. 250, 251 (1891).

The right to be let alone has matured as the concept of a right of privacy, constitutionally interposed between the state and those individual activities which are properly regarded as beyond the legitimate reach of public observation or control:

> "[A]lso fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.

> 'The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.' Olmstead v. United States, 277 U.S. 438, 478, 72 L. Ed. 944, 956, 48 S. Ct. 464, 66 ALR 376 (1928) (Brandeis, J., dissenting). See Griswold v. Connecticut, supra; cf. NAACP v. Alabama, 377 U.S. 449, 462, 2 L. Ed. 2d 1488, 1499, 78 S. Ct. 1163 (1958)." *Stanley* v. *Georgia,* 394 U.S. 557, 564 (1969).

The area of activity which has been the most prominent beneficiary of the constitutional tradition of individual autonomy is that concerning marriage, the family, and sexual relationships. See, *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942), where a unanimous court held that the "right to have offspring" was a basic "human right"; and *Loving* v. *Virginia,* 388 U.S. 1010 where marriage was described as "one of the 'basic civil rights of man; fundamental to our very existence and survival' ", 388 U.S. at 12 (quoting from *Skinner* v. *Oklahoma, supra*); see also *Pierce* v. *Society of Sisters,* 368 U.S. 510 (1925); *Meyer* v. *Nebraska,* 262 U.S. 390 (1923) and *Prince* v. *Massachusetts,* 321 U.S. 158, 166 (1944).

In *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), a Connecticut statute making criminal the use of "any drug, medicinal article or instrument for the purpose of prevent-

ing conception," was reviewed and invalidated by the Court. The appellants were the Executive Director of the Planned Parenthood League of Connecticut and a licensed physician, both of whom had given advice and instruction on the use of contraceptive devices, and had been convicted as accessories to the crime of such use.

While the appropriate textual and doctrinal foundation for the Court's judgment was a matter of significant disagreement, there was full accord among the seven Justices in the majority as to the essence of that judgment: namely, that the sexual intimacies of man and wife are correctly considered to be private matters into which the state may not—at least without compelling justification*—intrude, and that the right to privacy in such matters is fundamental to our constitutional order. See 381 U.S. at 485, 486, 495 *et seq.* and 503-504; see also, *Poe* v. *Ullman*, 367 U.S. 497, 550-55 (1961) (dissenting opinion of Mr. Justice Harlan). The consensus can be stated more broadly as embracing the proposition that "[t]here are limits to the extent to which a legislatively representative majority may conduct . . . experiments at the expense of the dignity and personality" of the individual, *Poe* v. *Ullman, supra*, 367 U.S. at 555 (dissenting opinion of Mr. Justice Harlan), quoting from *Skinner* v. *Oklahoma, supra*, 316 U.S. at 535 (concurring opinion of Mr. Justice Jackson).

The textual basis within the Constitution of the fundamental right of privacy articulated in *Griswold* was the subject of disagreement among the Justices who concurred in the judgment that such a right existed. Mr. Justice

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* See discussion as to applicability of compelling interest analysis on pages 14-15, *infra*.

Douglas, who wrote for the Court, relied upon the "penumbra" of privacy generated by the First, Third, Fourth, Fifth and Ninth Amendments. 381 U.S. at 484-85. Mr. Justice Goldberg, in whose concurring opinion Mr. Chief Justice Warren and Mr. Justice Brennan joined, stressed the importance of the Ninth Amendment as lending "strong support to the view that the 'liberty' protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments." 381 U.S. at 488-494. Mr. Justice Harlan concurred on the basis of the Due Process Clause of the Fourteenth Amendment of and in itself, determining that the challenged legislation violated "basic values 'implicit in the concept of ordered liberty,'" 381 U.S. at 500, quoting *Palko* v. *Connecticut*, 302 U.S. 319; 325 (1937); see also *Poe* v. *Ullman, supra*, 367 U.S. at 349-355 (dissenting opinion of Mr. Justice Harlan). Mr. Justice White, in his concurring opinion, also drew support from the Due Process Clause. 381 U.S. at 502-03.

Thus, seven Justices of this Court agreed in *Griswold* that there is an important right of privacy to which the Connecticut contraceptive legislation did violence. This consensus was arrived at notwithstanding the silence of the Constitution's text on the matter, and the absence of agreement as to an acceptable doctrinal means of overcoming that silence. Such a consensus, in the face of these analytical difficulties, is itself compelling evidence of the fundamental nature of the right to privacy in the context of intimate sexual relationships.

In the wake of *Griswold*, a variety of Courts have been asked to extend the reach of its protection to include the

right of a woman to secure an abortion. The response has been almost uniformly affirmative. In *Roe* v. *Wade*, 314 F. Supp. 1217 (N.D. Texas 1970), *juris. postponed to hearing on merits*, 401 U.S. —— (May 3, 1971) (No. 70-18, 1971 Term), the three-judge District Court recognized: "the right of choice over events which, by their character and consequence, bear in a fundamental manner on the privacy of individuals." 314 F. Supp. at 1221. Accordingly, the Court found there to be a "fundamental right to choose whether to have children." *Id.* at 222. The three-judge District Court in *Doe* v. *Bolton*, 319 F. Supp. 1048 (N.D. Ga. 1970), *juris. postponed to hearing on merits*, 401 U.S. —— (May 3, 1971) (No. 971, 1970 Term; renumbered No. 70-40, 1971 Term), reached a similar conclusion:

> Rather than regulating merely the quality of the decision to have an abortion, and the manner of its performance, the Georgia statute also limits the number of reasons for which an abortion may be sought. This the State may not do, because such action unduly restricts a decision sheltered by the Constitutional right to privacy. *See* Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed.2d 510 (1965); California v. Belous, 71 Cal.2d 954, 80 Cal. Rptr. 354, 458 P.2d 194 (1969), cert. den. 397 U.S. 915, 90 S. Ct. 920, 25 L. Ed.2d 96 (1970). The question becomes a matter of statutory overbreadth. 319 F. Supp. at 1056.

In *Doe* v. *Scott*, 321 F. Supp. 1385 (N.D. Ill. E.D. 1971), *appeal docketed sub nom., Hanrahan* v. *Doe*, 39 U.S. Law Week 3438 (U.S. Mar. 29, 1971) (No. 1522, 1970 Term; renumbered No. 70-105, 1971 Term), yet another three-judge District Court invalidated statutory inhibitions on

the obtaining of abortions, in deference to "women's rights to life, to control over their own bodies, and to freedom and privacy in matters relating to sex and procreation." 321 F. Supp. at 1389. The Supreme Court of the State of California has likewise observed that "[t]he fundamental right of woman to choose whether to bear children follows the Supreme Court's and this Court's repeated acknowledgment of 'a right of privacy' or 'liberty' in matters related to marriage, family and sex." *People* v. *Belous*, 80 Cal. Rptr. 354 (1968), *cert. den.*, 397 U.S. 915 (1970). See also *Babbitz* v. *McCann*, 310 F. Supp. 293 (E.D. Wisc. 1970), *appeal dis. for want of juris.*, 400 U.S. 1 (1970).

In both language and result,* these subsequent decisions interpret *Griswold* v. *Connecticut, supra*, as establishing a right of sexual privacy which extends to both married and single men and women. Even Courts which have not been willing to extend the *Griswold* rationale to the abortion context have restated the right to contraception in terms of broadest applicability. Thus, in *Steinberg* v. *Brown*, 321 F. Supp. 741 (1970), the three-judge District Court upheld the challenged abortion statute but recognized that "[t]he right and power of a man or a woman to determine whether or not to participate in this process of creation is clearly a private and personal one with which the law cannot and should not interfere." 321 F. Supp. at 746. See also *Rosen* v. *Louisiana State Board of Medical Examiners*, 318 F. Supp. 1217, 1222 (1970).

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* For example, the claims of single women were expressly before the Courts and encompassed in their favorable rulings in *Roe* v. *Wade, supra*, 314 F. Supp. at 1219-20; *Doe* v. *Bolton, supra*, 319 F. Supp. at 1050-54; and *People* v. *Belous, supra*, 80 Cal. Rptr. at 355.

The Court of Appeals for the First Circuit, in finding for the appellee, William R. Baird, took a similar view of the reach of *Griswold*:

> To say that contraceptives are immoral as such, and are forbidden to unmarried persons who will nevertheless persist in having intercourse, means that such persons must risk for themselves an unwanted pregnancy, for the child, illegitimacy, and for Society a possible obligation of support. Such a view of morality is not only the very image of sensible legislation; we consider that it conflicts with fundamental human rights. In the absence of demonstrated harm, we hold it is beyond the competancy of the State. See the various opinions in *Griswold* v. *Connecticut,* ante, particularly those of Mr. Justice Harlan and Mr. Justice White, concurring. See also *Richards* v. *Thurston,* 1 Cir., 4-28-70.

In applying this Court's decision on *Griswold* v. *Connecticut,* State and federal tribunals alike have thus interpreted the right of sexual privacy as one which extends to single men and women. Any other interpretation would expose to State control decisions which lie at the very heart of physical, sexual and emotional intimacy.

II.

The Massachusetts legislation unconstitutionally burdens the right to employ contraceptive devices.

A. *The Massachusetts Law Seriously Burdens Both Single and Married Persons in the Exercise of the Right to Employ Contraceptive Devices.*

Until 1966, the distribution of contraceptive devices was prohibited in Massachusetts. In 1966, after the Court's decision in *Griswold* v. *Connecticut,* the prohibitory statute (Mass. G.L. c. 272 Section 21) was amended to permit the administration or prescription of such devices by a registered physician for married persons, and the furnishing of prescribed devices by a registered pharmacist. The legislature, quite clearly, was making "what it thought to be the precise accommodation necessary to escape the *Griswold* ruling." *Baird* v. *Eisenstadt, supra,* 429 F.2d at 1401; see also, *Commonwealth* v. *Baird, supra,* 1969 Mass. A.S. at 729, 247 N.E.2d at 576 (1969).

The Massachusetts legislature was successful in devising a statutory scheme which avoided—on a formal and narrow reading—the ruling in *Griswold* and yet maintained a formidable deterrent to the use of contraceptives. Under it, single people are prevented entirely from lawfully securing contraceptive devices within the state. This effectively leaves unmarried people the options of securing such devices from outside the State, securing them illegally, or foregoing their use.

Married people can secure such devices within the State, but only after undergoing the expense and inconvenience of formal consultation with a licensed physician. In addi-

tion to the general deterrent force of such inconvenience, there is the very real possibility that at any given time a married couple may be unable to see a doctor immediately. Newlyweds face the peculiar dilemma of having to see a doctor after their wedding and before their wedding night. The Massachusetts law therefore, seriously burdens the marital relationship.

B. *The Massachusetts Contraceptive Law Is Unredeemed by Any Legislative Interest Which It Serves.*

1. The applicable test.

In evaluating the claim that some state interest justifies a legislative infringement upon the right of sexual privacy delineated above, Courts have drawn upon two alternate modes of analysis. One approach has been to require the justification of the infringement by a compelling state interest. This approach has predominated in the recent judicial evaluations of restrictive state abortion statutes. See, *e.g., Roe* v. *Wade, supra,* 314 F. Supp. at 1222; *People* v. *Belous, supra,* 80 Cal. Rptr. at 360; and *Doe* v. *Scott, supra,* 321 F. Supp. at 1390. It is the basis of two of the concurring opinions in *Griswold* v. *Connecticut.* See 381 U.S. at 497 (concurring opinion of Mr. Justice Goldberg); and 381 U.S. at 503-04 (concurring opinion of Mr. Justice White).

The alternative approach is to define with some precision the boundaries of the right to privacy which is being respected, and, within those boundaries, treat the right as an absolute protection against state intrusion. Hence, the Court in *Doe* v. *Bolton, supra,* found the right to be free from state interference as regards the *reasons* for seeking

an abortion to lie with the right of sexual privacy and treated it as an absolute right:

> Rather than regulating merely the quality of the decision to have an abortion, and the manner of its performance, the Georgia statute also limits the number of reasons for which an abortion may be sought. This the state may not do. . . . The question becomes a matter of statutory overbreadth. 319 F. Supp. at 1056.

A similar analytical process underlay the dissenting opinion of Mr. Justice Harlan in *Poe* v. *Ullman, supra,* where the details of married intimacy are placed beyond the reach of the State:

> It is one thing when the state exerts its power either to forbid extra-marital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledge a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy. 367 U.S. at 553.

The majority opinion in *Griswold* likewise appears to be bottomed on this form of analysis. See 381 U.S. at 485-86.

Either means of analysis yields the same conclusion in the instant case. The Massachusetts contraceptive legislation plainly trespasses upon the area of sexual privacy which should be protected absolutely from intrusion by the state. Moreover, it is unsupported by a compelling state interest, or indeed by any interest even approaching the threshold of compelling importance. These conclusions will be amplified in the discussion which follows.

2. State interests.

(a) *Massachusetts' moral judgment about the use of contraceptives.*

Prior to 1966, the contraceptive statute was contained in the chapter of the Massachusetts laws pertaining to "Crimes Against Chastity, Morality, Decency and Good Order," and the prescription or distribution of contraceptives was completely forbidden. It is apparent, as noted above, that the purpose of the legislation was and is to prevent the use of contraceptives *per se*, on independent moral grounds, and that the 1966 amendments to the legislation were merely designed to circumvent the limitations of this Court's decision in *Griswold*. See *Baird* v. *Eisenstadt, supra,* 429 F.2d at 1401.

This legislative goal, while well served by the challenged enactment in its present form, cannot provide its constitutional justification. Whatever the ultimate reach of the right to sexual privacy, it surely encompasses the right of individuals to decide whether or not to prevent conception. Defined absolutely, the right of privacy involved must extend that far. The very essence of the intrusion to be condemned is that of the State placing married and single individuals in the position of having to suffer the risk of an unwanted pregnancy, of an abortion or of foregoing sexual intercourse. To do so in the name of a corporate moral judgment that contraception is wrong is to substitute the judgment of the State for that of the individual on a matter of the most sensitive and intimate sort. The State is remolding the physical and emotional contours of the human sexual experience on the basis of its moral determination about contraceptives. Similarly, were such a basis to be

accepted as satisfying the compelling state interest test, there could be effectively no right of sexual privacy.

If *Griswold* stands for nothing else, it stands for the proposition that a moral judgment against contraceptives cannot be effectuated by State restraint upon their use.

(b) *The State's interest in health.*

The Supreme Judicial Court of Massachusetts found justification for the statute in the proposition that "[t]he Commonwealth has a legitimate interest in preventing the distribution of articles designed to prevent contraception which may have undesirable, if not dangerous, physical consequences." *Commonwealth* v. *Baird, supra,* 355 Mass. at 753.

At the outset, it must be recognized that health concerns bear no relationship at all to the complete exclusion of unmarried persons from the statutory scheme. Clearly the distinction between married and unmarried persons cannot be sustained on this basis.

The requirement of a licensed physician's prescription of contraceptives for married persons cannot be separated from the exclusion of unmarried persons, for it provides strong support for the finding of the Court of Appeals below:

> On this record we do not believe that the legislature suddenly reversed its field and developed an interest in health. Rather, it merely made what it thought to be the precise accommodations necessary to escape the *Griswold* ruling. 429 F.2d at 1401.

More striking support for this view is found in the circumstance that prior to the 1966 *Griswold* accommodation, Massachusetts physicians were forbidden to prescribe contraceptive devices, even when the health of their patients required their use. See *Baird* v. *Eisenstadt*, *supra*, 429 F.2d at 1401.

Even if taken at face value, the requirement that all contraceptive devices be distributed only upon prescription, however safe their use has been proven to be, is palpably overbroad. In the words of the Court of Appeals:

> In addition, we must take notice that not all contraceptive devices risk "undesirable * * * [or] dangerous physical consequences." It is 200 years since Casanova recorded the ubiquitous article which, perhaps because of the birthplace of its inventor, he termed a "redingote anglais." The reputed nationality of the condom has now changed, but we have never heard criticism of it on the side of health. We cannot think that the legislature was unaware of it, or could have thought that it needed a medical prescription. We believe the same could be said of certain other products. Petitioner says this is true of vaginal foam. Since he failed to prove it, we cannot so find, but we may assume, broadly, that not all chemical compounds are inherently dangerous. The legislature made no attempt to distinguish, in the statutory restriction, between dangerous or possibly dangerous articles, and those which are medically harmless. 429 F.2d at 1401.

The indiscriminate breadth of the prescription requirement, of course, is reinforcement for the view that health is by no means the target of the legislation.

In light of the foregoing, it is difficult to credit the view that legitimate State concerns about the health of its citizens should be invoked to preserve the statute, in whole or part. The statute in its present form is the product of a kind of constitutional minimalism, wherein a patently unconstitutional law is reformed in the most limited way possible, in order to preserve its essence. Here, the essence of the legislation is clearly that which is constitutionally objectionable, namely, the State's assertion of a moral view concerning the decision of individuals to prevent conceptions.

Even if this aspect of the health contention is set aside, the statute cannot be justified on these grounds. Clearly, the exclusion of unmarried persons cannot be so supported. Neither can the overbroad requirement of a doctor's prescription for all contraception devices, however innocuous. Given the fundamental nature of the constitutional right of privacy involved, the problem of overbreadth is especially acute. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button*, 371 U.S. 415, 438 (1963). See also, *Griswold* v. *Connecticut*, *supra*, 381 U.S. at 485; and *United States* v. *Robel*, 389 U.S. 258, 265-66 (1967).

It should be noted that the most dramatic effect of the contraceptive legislation on the health of Massachusetts residents is adverse. Unwanted pregnancies, even in a healthy woman, expose her to the not inconsiderable risks which attend any pregnancy, to the possibility of an abortion, with its attendant risks, and to serious mental anxiety. By preventing unmarried persons from securing medical assistance vis-a-vis those contraceptive devices which do require continuing professional supervision, the law en-

courages the dangerous employment of such devices without medical supervision. Finally, the statute may well result in an increase of illegitimate births,* with an attendant infliction of emotional harm on the children and the parents involved, and a serious drain on social resources.

In the face of all of the foregoing analysis of the relationship between the health of Massachusetts' residents and the challenged statute, it surely cannot be said that the statute—with its patent overbreadth and thinly disguised evasion of *Griswold*—promotes a compelling State interest in health. Neither can it be said that the State's interest in health is such that an appropriately delineated right of privacy would be compatible with the law's reach. A carefully drawn statute, which required a prescription for those contraceptive devices which require medical supervision, and treated single and married persons alike, would advance a compelling interest of the State, and presumably, would not conflict with an appropriately deline-

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* Except for 1914, there are no figures on illegitimacy in Massachusetts for the years prior to 1961. From 1961 to 1968 the absolute number of illegitimate births, and their proportion of all births has increased. In 1961, 3042 births or 2.7% of all births to Massachusetts residents were out-of-wedlock. In 1968, the figures were 5626 births and 6.1% of all births. Beth Murphy, "Out of Wedlock Births in Massachusetts, 1961-1968," p. 2 (unpublished paper prepared for Massachusetts Department of Public Health).

For the years 1966-1968, 24% of white and 41% of non-white legitimate first births to Massachusetts residents were conceived before the marriage of their parents. When the number of illegitimate births is added to this figure, 31% of white and 64% of non-white first births occurring in 1966-68 were non-maritally conceived. Beth Murphy, "The Temporal Relationship of Marriage, Conception and Birth in Massachusetts, 1966-1968," pp. 7-8 (unpublished paper prepared for the Massachusetts Department of Public Health and Harvard University School of Public Health).

ated right of sexual privacy. But, as demonstrated above, the challenged provision falls radically short of such a model.

(c) *The interest of the State on the morality of sexual behavior.*

The only remaining colorable interest of the Commonwealth of Massachusetts in the Statute is that of deterring pre-marital sex. (The Statute, of course, has no special relationship to the extra-marital sexual activities of married persons.)

As in the health interest, there is here some serious question as to whether the statute is in fact addressed to sexual morality. Fornication in Massachusetts is a misdemeanor punishable by a maximum of a thirty dollar fine or three months in jail (Mass. G.L. c. 272), while violation of the instant Statute is a felony punishable by up to five years in prison. It is indeed "hard to believe that the legislature adepted a Statute carrying a five-year penalty for its possible, obviously by no means fully effective, deterrence of a ninety-day misdemeanor." *Baird* v. *Eisenstadt, supra,* 429 F.2d 1401. Again the history of the statute, with its pre-1966 prohibition on all distribution of contraceptives, undercuts the proferred State interest. The prohibition on married persons obtaining contraceptives could hardly have been addressed to the prevention of extra-marital sexual activities.

As the accepted scope of the right of privacy expands, the notion that a state has a legitimate interest in adjusting the sexual morality of its citizens is itself open to serious

question. See e.g., *Buchanan* v. *Batchelor*, 308 F. Supp. 729 (3d Ct. N.D. Tex. 1970).

If the State does have a secure basis for a proscription of fornication it is the interest in reducing the birth rate of illegitimate children. The Massachusetts law accomplishes just the reverse, presumably, by greatly burdening the use of contraceptives.*

But if it is assumed, arguendo, that sexual morality can plausibly be considered a goal of the legislation, and that such a goal is permissable, it cannot save the statute. These assumptions could validate a statute making fornication illegal. They cannot justify a statutory scheme which (1) seriously burdens the marital relationship; (2) subjects unmarried persons to the physical and emotional risks of an unwanted pregnancy.

If the State has any interest and place in defining sexual morality, it can do so with its criminal laws directly. Restricting access to contraceptives exacts a high price in personal privacy and returns to the State an indirect and ineffective curb on sexual activities which the State condemns. Above all, if viewed as a means of enforcing sexual morality, the statute emerges as a grossly indiscriminate undertaking. Pre-marital sexual activities are burdened far more heavily than extra-marital sexual activities by married individuals. And the married sexual activities of individuals are burdened just as heavily as their extra-marital ones.

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* See footnote on page 20, *supra*.

III.

In challenging the validity of his conviction, appellee may assert the statute's adverse effect on the fundamental rights of third parties not within the statute's prohibition.

Whether the fundamental rights of privacy and liberty infringed by the statute are possessed by all unmarried adults, or are special to married persons, the appellee has standing to challenge the constitutional validity of the statute under which he is being prosecuted. The injury to his liberty and pocketbook is direct and substantial: he has been prosecuted, convicted and jailed. There is no question that one against whom a criminal statute is enforced has interest in questioning that statute's validity to constitute a "case or controversy" within the meaning of Article III. *Baird* v. *Eisenstadt, supra* at 1402.

This Court, however, has developed rules of self-restraint that limit the constitutional attacks which a party directly affected by a statute's operation may make. *Barrows* v. *Jackson*, 346 U.S. 249, 255. Under these canons of practice, or "standing" as they are sometimes called, a person ordinarily may not assert that a statute infringes the rights of third parties not personal to him. Thus a person may not assert that a statute, though constitutional as applied to him, is unconstitutional as applied to third parties coming within a possible future application of that statute. *Yazoo & Mississippi Valley Railroad Co.* v. *Jackson Vinegar Co.*, 226 U.S. 217; *United States* v. *Raines*, 326 U.S. 17, 21. The policy reasons for this rule are discussed in *Barrows* v. *Jackson, supra* at 256.

It is equally well-established that in unique situations where it would be difficult if not impossible for the third person to protect his rights in a future proceeding, the need to protect the fundamental rights of third parties will outweigh the rule of practice, and their rights may be asserted by the party before the court. *Barrows* v. *Jackson, supra* at 256. In *Pierce, supra, Barrows* v. *Jackson, supra, NAACP* v. *Alabama,* 357 U.S. 449, 462, and *Griswold, supra,* individuals directly injured by the operation of a statute could challenge its validity by asserting third party rights adversely affected and not otherwise subject to protection in a judicial proceedings. See Sedler, "Standing to Assert Constitutional *Jus Tertii* in the Supreme Court," 71 *Yale L.J.* 599, 600, 626-633 (1962); Note, "The Overbreadth Doctrine," 83 *Harvard L.R.* 844, 847-851 (1971).

The case at bar clearly falls within the "unique situation" rule enunciated in *Barrows* as essential to the protection of fundamental rights. The statute is directed only at distributors, and since it does not penalize use or possession of contraceptives by individuals, it is unlikely that the rights of unmarried and married adults, unless raised by appellee, can ever be protected in a judicial forum. Unlike the situation in *United States* v. *Raines, supra,* and the typically overbroad situation, where the third party rights can be asserted when the statute is directly applied against them, married and unmarried persons who do not distribute contraceptives can never be prosecuted under this statute. Thus they are effectively denied the opportunity to challenge a statute that substantially burdens their rights.

An additional reason for applying the unique situation rule is that the abridged rights are fundamental ones. Clearly the right to educate one's children, the right to as-

sociate freely, and the right to buy a house free of racial discrimination, protected in previous applications of the unique situation rule, are no more deserving of protection than the right to exercise control over bodily and emotional processes and individual identity. *Griswold, supra* at 486.

Furthermore, since appellee's interest in avoiding conviction is substantial, he is as likely and as well-equipped to present as vigorous and well-documented defense of third-party rights as those persons themselves. The situation is not one where the court is forced to judge the statute in terms of hypothetical applications uninformed by the in-depth factual presentation of one motivated by his own personal rights. Appellee, in addition, stands in a particular relationship to third parties that accredits him as their spokesman. For several years appellee has singlehandedly campaigned against outmoded laws, and undergone prosecution and jail to enable married and unmarried persons to obtain contraceptives without unnecessary and unlawful burdens. Surely he is likely to assert those rights as vigorously as the holders themselves. Secondly, the right at issue is that of unmarried and married adults to obtain harmless contraceptives from non-medical distributors, without the delay, expense and inconvenience of obtaining a doctor's prescription—precisely the position of appellee vis-a-vis the parties whose interests he asserts. *Griswold, supra,* at at 481, 482.

CONCLUSION

The judgment of the Court of Appeals for the First Circuit should be affirmed.

Respectfully submitted,

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